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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.,
Petitioner,
v.

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et. al.,*
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS
NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., AND INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO

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OCTOBER TERM, 1989

No. 89-186

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.,
Petitioner,
v.

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et. al.,*
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS
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STATEMENT OF THE CASE ¹

Petitioner, Community Electric Service of Los Angeles, Inc., ("CES"), was organized as a corporation under the laws of the State of California in December, 1976.

¹ The opinion and orders of the court of appeals are set out in the petition for a writ of *certiorari* and the district court's unreported order granting summary judgment, entered August 6, 1987, and its judgment entered on that same date is set out in brief in opposition of respondents Southern Sierras Chapter, National Electrical Contractors Association, *et al.* The relevant statutory provisions are reprinted in part in the *certiorari* petition and in that brief in opposition.

As provided for in California Revenue and Taxation Code, §§ 23301 & 23303, CES's corporate powers, rights and privileges were suspended for non-payment of its corporate franchise taxes in July, 1983. Under California law, by virtue of such suspension, CES did not have the capacity to sue or be sued at the time CES filed its federal anti-trust complaint in this case in January, 1986 alleging violations of the federal anti-trust laws, the Racketeer Influenced and Corrupt Organizations Act and related California laws. *See Appendix To The Petition For A Writ of Certiorari* (hereinafter "Pet. App.") at pp. 32-33, 35-36.²

The respondents, in their answer to the complaint, alleged that CES lacked the capacity to sue. CES, nevertheless, took no action until June, 1987 to have the California Tax Franchise Board issue a certificate of revivor reinstating CES's corporate powers for the purpose of pursuing this litigation. That revivor was, in fact, issued in June, 1987. By that time, the four year statute of limitations on CES's anti-trust claims had run. *See Pet. App. 33.*

The district court granted summary judgment in favor of the respondents on the ground that CES lacked capacity to commence this action under Fed. R. Civ. Proc. 17(b) and that CES did not regain the capacity to sue in federal court until after the statute of limitations expired on all of the claims asserted in the complaint. *See Pet. App. 3.* The court of appeals affirmed both the hold-

² While not directly relevant for the present purposes, CES' complaint challenged the legitimacy of the travel/subsistence pay provisions of the multi-employer collective bargaining agreement between International Brotherhood of Electrical Workers Local 440 and the Southern Sierras Chapter, National Electrical Contractors Association. In essence, these provisions required a signatory employer who was working under the agreement at a stated distance from the employer's principal place of business, to make a daily travel/subsistence payment of \$35 to each of its electrician employees. *See Pet. App. 32.*

ing and rationale of the district court. See Pet. App. 34-41.

ARGUMENT

The decision below is plainly correct. There are no contrary court of appeals decisions. The *certiorari* petition should therefore be denied.

1. Fed. R. Civ. Proc. 17(b) states "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

It is undisputed that petitioner CES was organized as a corporation under California law. It is also undisputed that as a matter of California law, CES—as an entity whose rights, powers and privileges as a corporation had been suspended by California—did *not* have the "capacity . . . to sue" at the time the instant suit was brought. Pet. App. 35-36, and that the reinstatement of those rights, powers and privileges after the applicable statute of limitations had run does "not validate retroactively the earlier filing," Pet. App. 36. In other words, California law provides that petitioner, CES, as a California corporation, had *no* "capacity" to bring or to maintain this suit at any relevant time within the applicable limitations period.

The court of appeals concluded that in these circumstances it follows directly from Fed. R. Civ. Proc. 17(b)'s plain language that this suit was properly dismissed. That court cited other court of appeals decisions reaching the same result on the same reasoning. Pet. App. 35 citing *Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R.V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). Petitioner cites *no* court of appeals case to the contrary and so far as we are aware there are *no* such cases.

Rather, petitioner argues that the California law in question is an "aberrant" or "hostile" state law that

poses a "significant threat" to the policies of the federal anti-trust laws and can, on that ground, be ignored in this federal lawsuit. Petition For A Writ of *Certiorari* (hereinafter "Pet.") at pp. 6-10 citing *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (In *Burks*, the Court—recognizing that "[c]orporations are creatures of state law" and that "in this field congressional legislation is generally enacted against the background of existing state law", 441 U.S. at 478—followed state corporation law.)

There is, of course, no reason to believe that a state will regulate the right to sue of the corporations *the state itself charters* in a "hostile" manner. Fed. R. Civ. Proc. 17(b) therefore properly proceeds on the premise that it is appropriate to look to the law of the incorporating state in determining a corporation's capacity to bring a federal suit in federal court rather than to embark on the enterprise of creating a judge-made federal law of corporate capacity.³ That Rule thus establishes that the

³ CES's claim, Pet. 7, that it was unable to meet California's legal requirements because of the alleged anti-trust violation here is not worthy of credence. Petitioner's "proof" of its anti-trust claim is exclusively contained in an *affidavit* of its so-called expert, Donald Martin. See Pet. App. 55-79. The affidavit demonstrates that Mr. Martin's expertise in labor relations is thin.

Mr. Martin failed to note, for example, that CES never sought to negotiate a separate agreement with respondent IBEW Local 440 but instead voluntarily agreed to be bound by the multi-employer area collective bargaining agreement. He further fails to note the uncontroverted evidence that the local employer association has resisted the subsistence pay provisions of the agreement for years and has been able to reduce their impact during collective bargaining.

The contention, completely unaccompanied by any factual or statistical analysis, that the travel/subsistence pay provisions have significantly disadvantaged CES cannot be squared with the facts. The total amount of subsistence payments paid by CES was barely over \$20,000. The only contract covered by the area agreement CES bid was for \$645,000 and CES was the low bidder by \$269,000. It

California law challenged here is not the type of “aberrant” or “hostile” state corporation law that the federal courts are to ignore in federal statutory cases.⁴

2. The court of appeals responded to CES’s due process claim, Pet. 12-14, as follows:

Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without argument or citation to authority.

does not take much economic analysis or anti-trust expertise to determine that if petitioner suffered economic harm, it was not due to the subsistence payments but rather to its overly low bid.

⁴ Lacking any judicial authority in point, CES ventures the suggestion that “Leading commentators on the Federal Rules appear to treat Rule 17(b)’s directive as applying only in those actions brought under a federal court’s diversity powers.” Pet. 9 (emphasis added) citing 6 Wright & Miller, *Federal Practice and Procedure*, 1561, p. 735 (1971) and 3A *Moore’s Federal Practice*, § 17.21, p. 17-174 (2d ed. 1989). Petitioner misreads the cited secondary authority.

As we have seen, Fed. R. Civ. Proc. 17(b) deals with the source of law—the law of the state of incorporation—to be referred to in determining a corporation’s capacity to bring its own lawsuits in its own name. The cited treatise sections, in contrast, deal with the law to be applied: (a) in cases in which the applicable federal law grants the *Federal Government* the right to bring a suit in the Government’s own name for and on behalf of a corporation; and (b) in cases in which a state law restricting the right of *foreign corporation* (*viz.*, corporations chartered by another state) to bring suit is invoked.

These are questions that Fed. R. Civ. Proc. 17(b) does not purport to decide. And these are questions that raise qualitatively different federalism issues than the sole question presented here. There is plainly far greater reason to create federal law to define the Federal Government’s capacity to sue than to define a private corporation’s capacity to sue. Moreover, there are reasons to be chary of adopting, as federal law, rules a state creates to govern foreign corporations that have no application to state rules created to govern domestic corporations.

Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. [Pet. App. 40.]

This eminently reasonable fact-specific determination that a particular litigant has not adequately preserved a constitutional contention plainly does *not* generate a question worthy of this Court's plenary consideration.

3. This Court has repeatedly held that where an agreement between employers and a union is claimed to violate the anti-trust laws, the National Labor Relations Board does *not* have primary jurisdiction over such labor law issues as must be decided in adjudicating the anti-trust claim. "[T]he federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the anti-trust laws." *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1975) (footnote omitted). *Kaiser Steel Corp. v. Mullens*, 455 U.S. 72, 83-86 (1982) (quoting and following *Connell*).

Against this background, the court of appeals refused to "extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case," Pet. App. 39, since that decision "rested on considerations of federal policy and primary jurisdiction not present here," *id.*⁵

In *Mt. Hood Stages*, the court of appeals carefully considered such cases as *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), heavily relied on by peti-

⁵ None of the respondents, except IBEW Local 440, were parties to the NLRB proceeding claimed to toll the statute of limitations here. That being so, the tolling argument, even if meritorious, cannot possibly apply to any respondent except Local 440. CES fails to address this point in its tolling discussion or even to bring this fact to the Court's attention.

tioner here, Pet. 16, as well as such cases as *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), that state the limits of the tolling doctrine.⁶ The *Mt. Hood Stages* decision holds that in federal anti-trust cases, "the doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period.'" 616 F.2d at 403 quoting *Johnson v. Railway Express*, 421 U.S. at 466.

On this aspect of this case, CES points to *no* contrary decision of this Court or of any court of appeals. That is not surprising for the Ninth Circuit law in this regard is a careful and faithful application of this Court's precedents.

In the final analysis, then, CES's equitable tolling argument, *see* Pet. 16-17, is nothing more than a reiteration of petitioner's argument, rejected below, that *Mt. Hood Stages* is inconsistent with *Ricci*. In making that argument, petitioner simply ignores both this Court's post-*Ricci* tolling decisions, such as *Johnson v. Railway Express*, and this Court's labor anti-trust decisions, such as *Connell*.

That being so, the court of appeals rejection of petitioners' position raises no question worthy of this Court's consideration.

⁶ In *Johnson v. Railway Express*, this Court rejected the contention that a potential plaintiff's civil rights claim under 42 U.S.C. § 1981 should be tolled while he pursues a Title VII of the Civil Rights Act of 1964 charge administratively before the Equal Employment Opportunity Commission. CES's position here is much weaker than the position of its counterpart in *Johnson* since (a) the administrative proceeding it claims should serve to toll the limitations period was not brought by petitioner but by one of the respondents and (b) the petitioner, in stark contrast to the civil rights litigant who is frequently unrepresented until he reaches the Federal courthouse door, was represented by counsel throughout the period in question.

CONCLUSION

For the above-stated reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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